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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 758.

NORTH AMERICAN BOND TRUST, City Bank Farmers Trust Company, Trustee,

Petitioner,

—against—

GUY T. HELVERING, Commissioner of Internal Revenue,

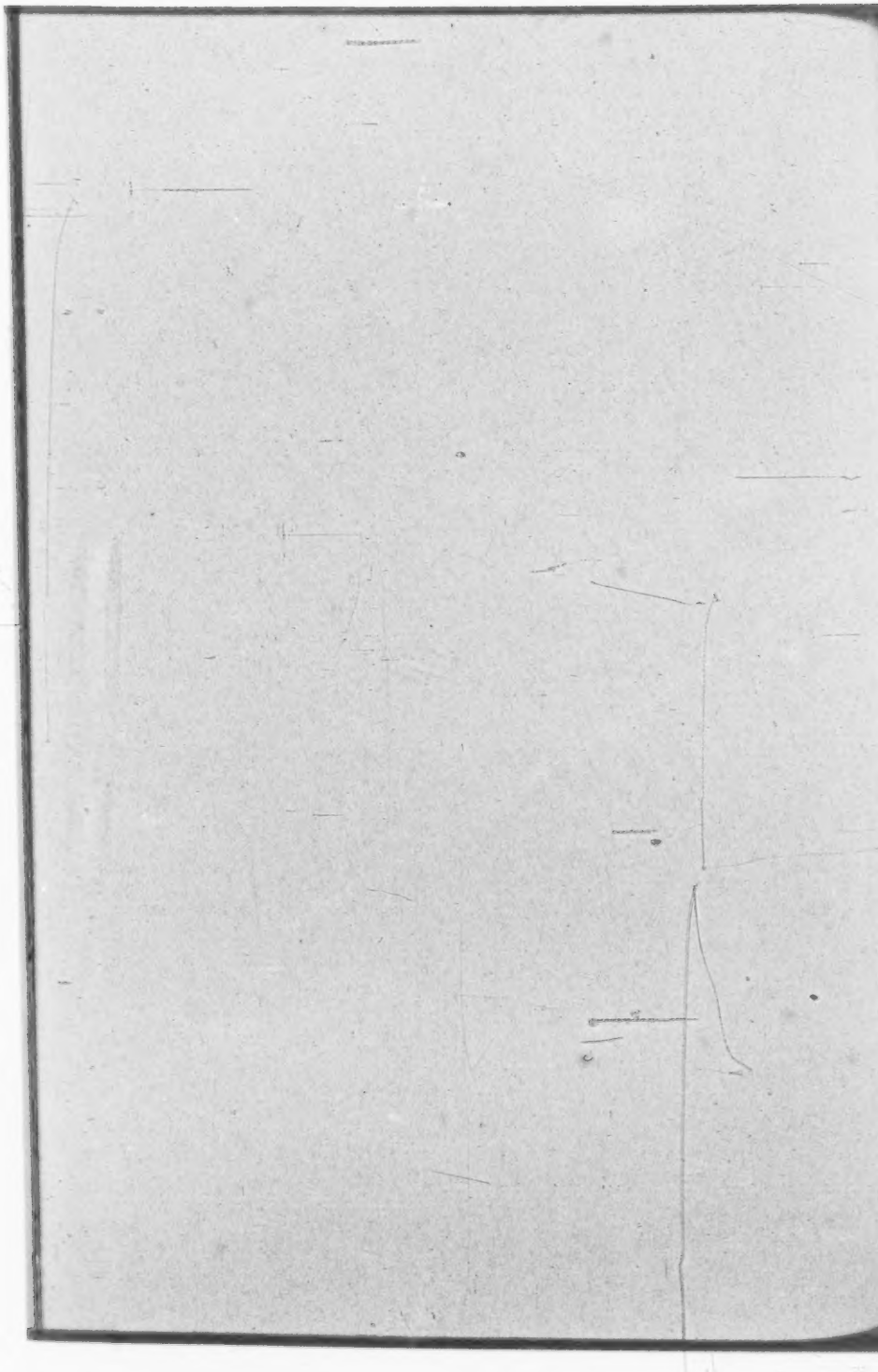
Respondent.

REPLY BRIEF FOR THE PETITIONER.

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REPLY BRIEF FOR THE PETITIONER.

1. Since the filing of the petition for a writ of certiorari herein, The Yale Law Journal and The University of Chicago Law Review have published articles in their respective December, 1941, issues discussing the decision below—51 Y. L. J. 338, and 9 U. of C. L. R. 163. Both articles, in addition to discussing the decision below, discuss the decision of the Circuit Court of Appeals for the Second Circuit in *Chase National Bank* v. *Commissioner*, 122 Fed. (2d) 540 decided at the same time. While not agreeing with all of the conclusions reached in these articles, they, we submit, strongly support the contentions made in the petition herein (a) that what constitutes an association taxable as a corporation in the field of investment trusts is, within the contemplation of subdivision (5) (b) of Rule 38 of the Rules of Practice of this Court, an important question of Federal law which has not been, but should be, settled by this

Court and (b) that the distinction made by the Court below between the two cases tends further to envelop the entire question in a cloud of uncertainty, since enterprises of essentially the same character have been placed in different categories for tax purposes by reason of formal variations. The effect of the two decisions must be to multiply rather than to reduce litigation, thus complicating the administration of the Revenue Laws. See also 14 Temple University Law Quarterly 333, especially 340-343.

2. In the brief for the respondent in opposition, the Solicitor General has, in the statement of the question presented and of the facts, characterized the petitioner as an investment trust of the "management type". The use of the quoted expression, it is submitted, is not warranted in that it begs one of the questions to be decided.

Prior to the enactment of the Investment Company Act of 1940, it was generally assumed that a management type investment trust or company was one in which a governing body performing the functions of the officers and directors of a corporation had either limited or unlimited power to dispose of securities in the portfolio and reinvest the proceeds in other securities, either for the purpose of realizing a profit or to strengthen or improve the character of the investments. At least, such activity was considered to be one of the principal attributes of a management type trust.

In its classification of investment companies, the Investment Company Act of 1940, in Section 4, divides them into three principal classes, namely, face amount

certificate companies, unit investment trusts, and management companies, and provides, after defining the first two,—

> "'Management company' means any investment company other than a face amount certificate company or a unit investment trust."

It is submitted that, if the Solicitor General is referring to the statutory definition above quoted, the reference is irrelevent and can be of no significance in the disposition of this tax case, and if he is referring to the earlier definition, it is not applicable here since, in the present case, as in the *Chase National Bank* case, there is no power to sell securities and reinvest the proceeds or any part thereof.

3. Referring to the Trust Agreement under which the petitioner was created, the brief for the Solicitor General, in a footnote on page 2 says:

> "The Trust Agreement was amended in 1933 in a minor respect (R. 79-80). * * *"

The amendment referred to was not minor as the Trust Agreement as originally drawn authorized the Trustee to reinvest the proceeds of called, matured or eliminated bonds, and the purpose and effect of the amendment were to remove this power by prohibiting reinvestment and requiring that the entire proceeds of all called, matured and eliminated bonds be added to currently distributable funds and distributed semi-annually to the Certificate holders. The amendment was made, in fact, because of an informal ruling of the Bureau of Internal Revenue that the Agreement as originally drawn created an association be-

cause of the existence of the reinvestment power. The ruling holding the petitioner to be a strict trust (R. 83-84) immediately followed the amendment.

A writ of certiorari should issue to review the decision below.

Respectfully submitted,

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